PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADMINISTRATORS.

A commission of 4½ per cent, allowed an administrator on personal property amounting to $263,000, will be reduced to 3 per cent where he had no unusual services to perform: Supreme Court of Pennsylvania, *In re Young's Estate,* 53 Atl. 151. Compare *In re Lilly's Estate,* 181 Pa. 478.

Fees

ADVERSE POSSESSION.

The decisions seem not to have established clearly the precise limits of the nature of the possession of woodland which is sufficient to give title under the statute of limitations. The Supreme Court of Illinois, dealing with this question in *Travers* v. *McElvain,* 65 N. E. 623, holds that for one to blaze out the boundary lines of part of a large tract of thickly wooded swamp lands, cut an inconsiderable amount of timber, and at various times to warn persons seeking to trespass thereon to keep off, does *not* constitute possession necessary for title by limitations. See and compare *Tucker* v. *Shaw,* 158 Ills. 326.

Wooded Land

ANTI-TRUST LAW.

A recent decision of interest in connection with the question of anti-trust legislation is the case of *Gibbs* v. *McNeeley,* 118 Fed. 120, where it is decided by the U. S. Circuit Court of Appeals (Ninth Circuit) that an association of manufacturers of and dealers in red cedar shingles in the state of Washington, formed for the purpose of controlling the production and the price of such shingles, which are made only in that state, but are principally sold and used in other states; and which, by its action in closing the mills of its members, has reduced the production, and has also arbitrarily increased the prices at which the product is sold, is a combination in restraint of

Interstate Commerce

ANTI-TRUST LAW (Continued).

interstate commerce, and unlawful under the anti-trust law of July 2, 1890. See the case of *Addyston Pipe and Steel Co.* v. *U. S.*, 175 U. S. 211.

ATTORNEY AND CLIENT.

In *Cameron* v. *Boeger,* 65 N. E. 690, the Supreme Court of Illinois holds that an agreement by the complainant that its attorneys shall receive as compensation for services in a suit a third of whatever is realized as the result of the litigation, or of any settlement pending litigation, does not amount to an equitable assignment to them of any portion of the subject matter of the litigation, so that they have no interest therein, and no lien for fees, which will prevent the complainant, without their consent, from dismissing the suit by stipulation with the defendant. "Where there is an agreement by a party to pay his attorney a reasonable compensation for his legal services out of the proceeds of the litigation, such agreement, depending as it does upon the mere responsibility of the employer, does not operate as an equitable assignment of any portion of the fund sought to be recovered in the suit." But see *Patten* v. *Wilson,* 34 Pa. 299.

Dismissing Suit

BENEFIT ASSOCIATIONS.

The Supreme Court of Michigan holds in *Supreme Tent of Knights of Maccabees* v. *McAllister,* 92 N. W. 770, that where two persons are married, and live as husband and wife till his death, both mistakenly supposing that she was divorced from her former husband, she being designated as the wife and beneficiary in his certificate in a mutual benefit association, is entitled to the insurance, though its by-laws provide that no certificate shall be made payable to one not a wife, husband, child, dependent, etc., of the member. Compare *Story* v. *Association,* 95 N. Y. 474.

Beneficiaries, Wife

CARRIERS.

Where freight transported over various lines of railway in a sealed car is injured, it is to be presumed, in the absence of evidence, that the injury occurred on the last line: *Cote* v. *New York, etc., R. Co.,* 65 N. E. 400. See *Moore* v. *R. R. Co.,* 173 Mass. 335.

Presumption

CARRIERS (Continued).

Burden of Proof

A passenger bought from a railroad company an excursion ticket at a reduced rate, with an endorsement on it that the person accepting it should assume all risk of accident and damage. The Supreme Court of Pennsylvania holds, in *Crary* v. *Lehigh Valley R. R. Co.,* 53 Atl. 363, that the acceptance of the ticket was a waiver of the common-law rule making the carrier liable for the passenger's safety; and he must affirmatively prove negligence on the part of the carrier and cannot avail himself of the presumption of negligence arising in favor of the passenger where an injury occurs. See *New Jersey Steam Nav. Co.* v. *Merchants' Bank of Boston,* 6 How. 344.

CIVIL CONTEMPT.

Power of President to Pardon

Proceedings to compel by fine or imprisonment obedience to an order of the court made in a civil suit to enforce the rights or administer the remedies to which a court of competent jurisdiction decides that a party to the suit is entitled, are not executions of the criminal laws of the land, but proceedings to secure suitors in their legal rights, and the president is without authority, under the grant to him of power to issue reprieves and pardons for offences against the United States, to relieve from imprisonment to enforce obedience to, or to pardon for disobedience of, such an order, because he may not release or destroy the legal rights or remedies of private citizens: U. S. Circuit Court of Appeals (Eighth Circuit), *In re Nevitt,* 117 Fed. 448. As to such power in a criminal case see *Ex parte Kearney,* 7 Wheat. 38 (43).

CODE PLEADING.

New Parties

In all code states it is provided that if the defendant fails to raise the question of defect of parties by demurrer or answer he waives the objection, and on the other hand, that at any stage of the proceeding the court may of its own motion and should bring in any parties necessary for a complete determination of the case. These provisions are dealt with by the Court of Appeals of New York in *Steinbach* v. *Prudential Ins. Co. of America,* 65 N. E. 281, where it is held that though the defendant did not raise such objection until at the close of the evidence, it moved to dismiss the case for such neglect, yet the court

CODE PLEADING (Continued).

should have brought in the parties, *not for the benefit of the defendant,* but for their own protection. Three judges dissent and the case presents a good discussion of the subject. Compare *Osterhoudt* v. *Board,* 98 N. Y. 239, 243.

COMPROMISE.

Fraud, Tender of Repayment

Against the dissent of three judges the Court of Appeals of Kentucky holds that where the plaintiff sued for personal injuries, admitting that he had received payment for his drug bill and loss of time, and the defendant pleaded payment in full under a compromise agreement set forth, a reply that this payment was the same as that admitted in the petition, and that the compromise agreement was signed by the plaintiff at a time when he could not read, and under false representations that it was a receipt for payment only for drug bill and loss of time, was not demurrable for failing to tender repayment of the amount received, though the plaintiff in such action cannot ordinarily escape such agreement by merely pleading fraud: *McGill* v. *Louisville & N. R. Co.,* 70 S. W. 1048. See *R. R. Co.* v. *McElroy,* 100 Ky. 153.

CONSIDERATION.

Promise to Repay Money

In *Thomson* v. *Thomson,* 78 N. Y. Supp. 389, the New York Supreme Court (Appellate Division, Third Department) holds that where the plaintiffs, being under no obligation to pay the defendant's debt to a third party, paid the same without the defendant's previous request, the plaintiffs were not entitled to recover on the defendant's subsequent express promise to reimburse them for the amount so paid; such promise being without consideration. See *Doty* v. *Wilson,* 14 Johns. 378.

CONSTITUTIONAL LAW.

Indeterminate Sentence, Former Jeopardy

The United States Supreme Court holds in *Dreyer* v. *Illinois,* 23 S. C. Rep. 28, that the right to the due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution is not infringed by the decision of a state court sustaining the validity of the Illinois indeterminate sentence act of 1899, under which statute in the case of certain crimes a convict would be committed for an indefinite time, not to

CONSTITUTIONAL LAW (Continued).

exceed the time fixed by statute. It is so held, though it is admitted that such statute in effect conferred judicial powers upon nonjudicial officers, and invested them with the pardoning power of the executive.

It is further held that a plea of former jeopardy cannot be based upon the discharge of the jury for their inability to agree on a verdict after considering the cause from four o'clock in the afternoon until half past nine in the morning of the succeeding day. Though this is not a capital case, the court enters into this question on the ground that possibly the Fourteenth Amendment may apply the rules applicable to cases of former jeopardy to all crimes. This, however, is not decided.

Equal Protection of Laws.

With three judges dissenting the Supreme Court of Missouri, holds, in *State* v. *Bengsch,* 70 S. W. 710, that a statute of the state imposing a tax on liquor manufactured for sale within the state, but which does not impose a tax on its manufacture for export is unconstitutional as violating the Fourteenth Amendment which guarantees to every citizen of the United States and of each particular state the equal protection of the laws.

Inheritance Tax Inequality

The Supreme Court of Minnesota holds, in *State* v. *Bazille,* 92 N. W. 415, that the so-called "Inheritance Tax Law" of that state is unconstitutional, because it operates unequally as between collateral, and also as between collateral and lineal descendants. Transfers of property to the former are taxed to the full value, when such value exceeds $5,000, whereas as to lineal descendants the tax is imposed only upon the excess over and above a fixed valuation of $5,000 and this classification the court refuses to regard as proper. See also *Drew* v. *Tift,* 81 N. W. 839.

CONTRACTS.

Consideration, Condition Precedent

A debtor had deposited with his creditor certain corporate bonds to purchase shares of corporate stock held by a third person, or a portion of them, and to sell one-half of the stock purchased to the debtor, with a covenant on the part of the creditor, whereby he surrendered his absolute right to dispose of his stock,

CONTRACTS (Continued).

and agreed to sell it to the debtor on credit or on joint account, at the latter's option. Upon these facts the Court of Appeals of New York holds, against the dissent of two judges, that failure to purchase all of the stock held by such third person did not render the agreement unenforceable: *Stokes* v. *Stokes,* 65 N. E. 176.

Restraint of Trade, Indefiniteness

A provision in a contract of sale of a business of manufacturing timber and ginning cotton that the seller will not engage in the business in any territory from which he secures his patronage so as to compete with the buyer, is void for indefiniteness as to territory: Supreme Court of North Carolina in *Shute* v. *Heath,* 42 S. E. 704. See, however, the Alabama case of *Moore & Handley Hardware Co.* v. *Towers Hardware Co.,* 6 South. 43. The court in discussing the question in the principal case gives a brief but interesting historical account of the doctrine.

CORPORATIONS.

Estoppel

A party who has entered into a contract for the sale of real property to a corporation, in reliance whereon the corporation has erected valuable improvements on the property for the purposes of its corporate business, will not be heard to assert that such property was not necessary for the business of the corporation: Supreme Court of Nebraska in *Coleridge Creamery Co.* v. *Jenkins,* 92 N. W. 125.

Contract with Stockholders

In *Dupignac* v. *Bernstrom,* 78 N. Y. Supp. 705, it is held by the New York Supreme Court (Appellate Division, First Department) that where the plaintiff agreed with the principal stockholder of the defendant company to render services to the defendant, and in consideration thereof to receive a certain per cent of the defendant's surplus earnings after the company had been placed on a paying basis and rendered solvent, and such agreement was ratified by the defendant's directors, and after the company had become solvent a resolution was passed applying 5 per cent of the net surplus earnings in payment of the plaintiff's services, the contract was valid, though the acts done for the corporation were past and had been done not on its request, but on that of a stockholder.

CRIMINAL LAW.

Groves v. *State,* 42 S. E. 755, presents a good discussion of the difference between the acts which constitute an attempt to commit a crime and those which constitute preparation merely. The Supreme Court of Georgia reviews the authorities and approves the distinction of Chief Justice Field in *People* v. *Murray,* 14 Cal. 159, where he says: "Between the preparation for the attempt, and the attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offence. The attempt is the direct movement towards the commission after the preparations are made."

Preparation vs. Attempt

In *State v. Bacon,* 70 S. W. 473, it appeared that the accused was convicted in A. county of embezzling the proceeds of a draft which had been given him in B. county, with instruction to take it to A. county and cash it. He had previously been acquitted in B. county of a charge of embezzling the draft. On these facts the Supreme Court of Missouri (Division No. 2) holds that as he was vested with authority to take the draft to A. county and have it cashed, and in so doing was not guilty of any crime, but his guilt arose when he converted the proceeds of the draft to his own use, the former acquittal was not a bar to the present prosecution.

Identity of Offence

DUE PROCESS OF LAW.

Under the Fourteenth Amendment to the United States' Constitution, forbidding the taking of property without due process of law, a defendant in a suit for separation and separate support may not have his answer stricken out, and be prevented from presenting a defence, for contempt: New York Supreme Court (Appellate Division, First Department) in *Sibley* v. *Sibley,* 78 N. Y. Supp. 743. Compare *Hovey* v. *Elliot,* 167 U. S. 409.

Preventing Defence, Contempt

DEEDS.

In *Holt* v. *Fleischman,* 78 N. Y. Supp. 647, it appeared that the plaintiff's grantor owning several adjoining lots, conveyed a part of the property to the plaintiff under a deed containing a covenant providing that, on the improvement of her adjoining lots, the houses erected thereon should be on a line with the fronts

Restrictive Covenants, Notice

DEEDS (Continued).

of the present adjoining houses annexed thereto, which deed was duly recorded; and the defendant acquired title to such adjoining property under a deed in *partition* between the heirs of such prior grantor. The N. Y. Supreme Court (Appellate Division, First Department) holds that the defendant was bound to take notice of the record of the plaintiff's deed, and was therefore bound by the restrictive covenant therein contained, imposing an easement on the adjoining property. Compare *Bradley* v. *Walker,* 138 N. Y. 291.

EASEMENTS.

Opening of Streets

The owners of land plotted it as a city, laying off streets, etc., but there was no acceptance of the dedication save such as arose from the purchase of lots with reference to the map. The defendant owning several lots inclosed them, so as to obstruct certain streets. In *State* v. *Hamilton,* 70 S. W. 619, the Supreme Court of Tennessee holds that the owner of other lots was not entitled to have all the streets inclosed by the defendant opened but only those affording him necessary ingress and egress to his property. One judge dissents without writing an opinion. Compare *Wilson* v. *Acree,* 97 Tenn. 378.

EQUITY.

Evidence to Overcome Answer

In *Sharp* v. *Behr,* 117 Fed. 864, it is held by the U. S. Circuit Court (E. D., Pennsylvania) that under the law of Pennsylvania, the testimony of a wife, supporting that of her husband, to a fact denied by the answer, is entitled at least to the weight of a corroborating circumstance, which is sufficient to satisfy the equitable requirement. See *Sower* v. *Weaver,* 78 Pa. 443, for the former view; and, for later cases in line with the modern view, which seems not however to have been passed on by the State Supreme Court, *Brenneman* v. *Rudy,* 8 Pa. Dist. R. 68, and *Guernsey* v. *Fronde,* 13 Pa. Super. Ct. 405.

Jurisdiction, Multiplicity of Suits

A railroad was defendant in several actions for trespass, the liability in each depending on whether the track had been properly constructed. The injury complained of was a constantly recurring one, and plaintiffs had previously sued for the trespass, and intended to do so in the future. Under these facts the

EQUITY (Continued).

Supreme Court of Mississippi holds that equity has jurisdiction to restrain the actions and consolidate them, to prevent the multiplicity of suits: *Illinois Cent. R. Co.* v. *Garrison*, 32 Southern, 996. With this case, compare *Tribette* v. *Railroad Co.*, 70 Miss. 182, where the court refuses to allow the consolidation of the suits.

FIXTURES.

The Court of Chancery of New Jersey in *Atlantic City Deposit & Trust Co.* v. *Atlantic City Laundry Co.*, 53 Atl. 212, discusses the essential nature of "fixtures," and summarizes its results by holding that to transmute chattels into realty, it must appear—first, that the chattels were actually annexed to the real estate, or something appurtenant thereto; second, that they were applied to the use to which that part of the realty to which they were connected was appropriated; third, that they were annexed with the *intention* to make a *permanent* accession to the freehold. Compare *Feder* v. *Van Winkle*, 53 N. J. Eq. 370.

What Constitutes

INSURANCE.

In *New York Life Ins. Co.* v. *Weaver's Adm.*, 70 S. W. 628, the Court of Appeals of Kentucky holds that where an insurance policy was procured by fraud, the fact that by its terms it was incontestable did not preclude the insurance company from rescinding it within a reasonable time after discovering the fraud on surrendering the premiums received. But where an incontestable insurance policy was procured by fraud, and the company did not elect to rescind the same during the life of the insured, and on her death, under an impression that it could not defend an action on the policy, paid the same, it was not entitled to maintain an action against the assured's administrator for deceit to recover the amount of the policy paid and for other damages.

Incontestable Policy, Rescission

INTERSTATE COMMERCE LAW.

The U. S. Circuit Court (W. D., Virginia) holds in *Interstate Commerce Commission* v. *Southern Ry Co.*, 117 Fed. 741, that competition which is real and substantial, and exercises a potential influence on rates to a particular point, brings into play the dissimi-

Discrimination in Rates

INTERSTATE COMMERCE LAW (Continued).

larity of circumstance and condition provided for by the interstate commerce act, and may justify a lesser charge for the longer than the shorter haul. The making of a lesser rate to a more distant and competitive point than is charged to a nearer non-competitive point is not, it is said, an unjust discrimination against the nearer point, nor does it give an undue preference to the more distant point, in violation of the interstate commerce act, where said rate is induced by real and substantial competition. The court goes one step further and holds that the fact that a railroad company has acquired the ownership of the only road which previously competed with its own for business at a certain point cannot affect the question whether its rates unjustly discriminate against such point in favor of another point where competition exists, where it affirmatively appears that the rates to the non-competitive point have not been increased since the purchase of the competing road. See also *East Tennessee V. & G. Ry.* v. *Interstate Commerce Commission,* 181 U. S. 18.

LANDLORD AND TENANT.

Defective Premises

A tenant slipped on ice formed in a hallway in the leased building the night before, and was injured. The ice was formed from water dripping from a defective closet, which defect had existed for some days, with the knowledge of the janitor of the building. Under these facts the N. Y. Supreme Court (Appellate Division, Second Department) holds that the liability of the landlord was determinable by the diligence required in removing the defect in the closet, not by the diligence required in removing the ice: *Hoag* v. *Williamsburgh Sav. Bank,* 78 N. Y. Supp. 141.

LATERAL SUPPORT.

Excavations, Notice

While in this country it is well-settled that an adjoining landowner is responsible to his neighbor for injuries to his buildings in consequence of excavations, when negligence on his part in making such excavations can be shown, it is not so clear what constitutes such negligence. In *Davis* v. *Summerfield,* 42 S. E. 818, the Supreme Court of North Carolina holds that an owner of land who excavates by the side of his neighbor's wall to a

LATERAL SUPPORT (Continued).

depth lower than the foundation of the wall, is negligent for failing to notify the neighbor of the *extent* of his proposed plans, though the neighbor knew that he was going to excavate, and is liable for injuries to the wall caused by his excavations.

LIMITATIONS.

In *Newberger* v. *Wells,* 42 S. E. 625, the Supreme Court of Appeals of West Virginia holds that the defence of the statute of limitations need not in all cases be specially pleaded, but that where a bill in equity discloses on its face laches, or the facts alleged show that the cause of action is within the statute of limitations, the bill is for that reason demurrable, unless sufficient facts are set forth in it to avoid laches or to take the case out of the statute. See and compare *Vanbibber* v. *Beirne,* 6 W. Va. 168.

Pleading, Demurrer

PARTIES.

In *Howe* v. *Mittelberg,* 70 S. W. 396, the Court of Appeals at St. Louis, Missouri, holds that a person to whom a chose in action has been assigned for collection is the trustee of an express trust, and, as such, may sue on the assigned demand in his own name.

Code Practice

STATUTE OF FRAUDS.

A contract whereby an oil company is to furnish oil to a merchant on certain terms for five years or so long as he should remain in business, is not within the statute of frauds, as it might have been performed within less than one year: Court of Appeals of Kentucky in *Standard Oil Co.* v. *Denton,* 70 S. W. 282.

Time of Performance

SUBROGATION.

Land devised to a wife was subject to a debt of the testator, and in order to pay this off she executed a note to a third party and her husband signed and acknowledged a mortgage on the land as security. The third party indorsed the note and gave it to the husband, who indorsed it to a bank, giving his own note as additional collateral, thereby obtaining the necessary money. On these facts it is held by the Court of Appeals

Advance to Discharge Incumbrance

SUBROGATION (Continued).

of Kentucky in *State Nat. Bank of Maysville* v. *Vicroy*, 70 S. W. 183, that, if the mortgage was invalid on account of the wife's coverture the bank would be remitted to the lien on the land which its money was used to discharge. See also *Kelley* v. *Ball*, (Ky.) 19 S. W. 581.

SUBTERRANEAN WATERS.

Rights of Landowner

The Supreme Court of California holds in *Katz* v. *Walkinshaw*, 70 Pac. 663, that where subterranean waters were not shown to exist in the form of a stream, but consisted of water percolating through a large area of porous soil, with no regular stratification, still the right of a landowner to use subterranean percolating waters, and divert the same from the land of an adjoining landowner, is *limited to a reasonable use* in connection with the use of his own land, and does not authorize him to appropriate such waters by artesian wells, and sell the same for the irrigation of distant lands, to the detriment of adjoining landowners. The case presents an excellent review of the authorities, and in applying the principle long ago settled in regard to the rights of a riparian owner to the case of underground percolating water reaches a conclusion more satisfactory than the old cases. See *Bassett* v. *Mfg. Co.*, 43 N. H. 569.

VERDICT.

Impeachment by Jurors

While it is well settled that a juror has no right to state to his fellow jurors, matters relevant to the case in hand, the Supreme Court of Texas holds in *St. Louis S. W. Ry. Co. of Texas* v. *Ricketts*, 70 S. W. 315, that affidavits of jurors that, pending their deliberation, the foreman stated that he was familiar with the defendant's depot at the place in question, and that it was uniformly not heated, which was a material issue in the case, were inadmissible to impeach their verdict for the plaintiff.